SOAH DOCKET NO. 582-15-2214
TCEQ DOCKET NO. 2015-0068-IWD

APPLICATION BY DOS REPUBLICAS COAL PARTNERSHIP FOR AMENDMENT AND RENEWAL OF TPDES PERMIT NO. WQ0003511000	§ § § § §	**BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS**

EDF GROUP'S REPLY TO EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY AND THE ADMINISTRATIVE LAW JUDGES:

COMES NOW Protestant EDF Group and files this Reply to Exceptions to the Proposal for Decision ("PFD") submitted in the above referenced dockets.

I. INTRODUCTION

Neither Dos Republicas Coal Partnership ("DRCP") nor the Texas Commission on Environmental Quality ("TCEQ") have ever conducted the requisite antidegradation review of the application to renew and amend TPDES Permit No. WQ0003511000 ("Application"). Instead, DRCP and TCEQ contend that an "after-the-fact" review of sampling data from an actual discharge that has already occurred is legally sufficient to comply with the antidegradation review requirements. Waiting to conduct the antidegradation review until after the mine discharges is inconsistent with the Clean Water Act[1] and the TCEQ's own rules. This approach endangers Elm and Hediondo Creeks, and the downstream landowners.

[1] Texas Water Code §§ 26.003 ("It is the policy of this state and the purpose of this subchapter to maintain the quality of water in the state consistent with the public health and enjoyment, the propagation and protection of terrestrial and aquatic life...) (emphasis added).

TCEQ Rule 307.5 requires that TPDES applications be subjected to an antidegradation review. TCEQ rules also require TPDES applications include a Technical Report that describes the wastewater in enough detail to evaluate water quality considerations.[2] Instead of providing the necessary description, DRCP focuses its efforts on challenging the relevancy of the abundant groundwater data from the Eagle Pass Mine presented by the EDF Group. In doing so, DRCP completely neglects the fundamental principle that the burden is on the applicant to prove the proposed discharge does not contain constituents that require monitoring or effluent limits. DRCP excepts to the PFD ironically claiming there is no evidence in the record to support an aluminum monitoring requirement or boron effluent limit, yet DRCP failed to provide **any** representative data or description that the TCEQ could have used to make such a determination. DRCP should not be entitled to benefit from its failure to satisfy its burden. The evidence in the record—an abundance of data related to the groundwater that will be a primary component of the discharge—demonstrates that at the very least an aluminum monitoring requirement and boron effluent limit are warranted.

Because of the legally-deficient antidegradation review, the EDF Group respectfully requests that the PFD be amended to require remanding the Application to the ED for an appropriate antidegradation review and that DRCP be ordered to provide a description of the discharge that includes constituent concentrations. In the alternative and without waiving its prior arguments, the EDF Group respectfully requests the ALJs stand behind the recommendations to require an aluminum monitoring requirement, boron effluent limit and four samples at every outfall pursuant to Other Requirement No. 10, and that the Commissioners adopt same.

[2] 30 Tex. Admin. Code §305.45(a)(8)(B)(ii).

II. GROUNDWATER DATA IS REPRESENTATIVE OF PROPOSED DISCHARGE

DRCP excepts to the PFD recommendations to include an aluminum monitoring requirement and a boron effluent limit of 2.0 mg/L. DRCP disputes these important changes to the Draft Permit claiming there is no evidence in the record in support of finding that aluminum or boron concentrations in the discharge will exceed 70% or 85% of the regulatory limit.[3] DRCP is simply reiterating the argument from its closing brief that the ALJs and Commissioners should ignore the groundwater data from the Eagle Pass Mine Area, and that Dr. Tischler focused on only the data from one well. The EDF Group has repeatedly pointed out that numerous groundwater samples from multiple wells peppered throughout the mine area have detected extremely high levels of aluminum and boron. DRCP also ignores the fact that the Railroad Commission of Texas ("RCT") concluded a boron limit was necessary.

The ALJs correctly conclude, "it was appropriate to use groundwater in analyzing the proposed discharge."[4] The TCEQ permit writer acknowledged at hearing that submitting the groundwater data "**would have been helpful ... in being able to see what's there, to possibly make any kind of determination if other effluent limitations would be needed**."[5] This is exactly right. The groundwater data is helpful because the proposed effluent will consist of mine seepage, **which is groundwater**.[6] Unfortunately, DRCP failed to provide groundwater data to the TCEQ.

The ALJs justifiably noted that DRCP does not anticipate the effluent will be 100% groundwater (although the terms of the Draft Permit certainly authorize it). The ALJs then correctly recognize, however, that groundwater is certainly a component of the discharge and the

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[3] DRCP Exceptions at pp. 3, 12 -13.
[4] PFD at 32.
[5] Tr. at 636:13 – 18 (emphasis added).
[6] Tr. at 636:19 – 22.

groundwater data is appropriate to rely upon as representative of the discharge at least to some degree.[7] DRCP argues "if groundwater is but one component of the ultimate discharge, one needs to know the impact of the groundwater on the overall quality of the discharge."[8] While that may be true, DRCP made no effort to describe the ultimate quality of the discharge for the TCEQ to evaluate. Instead, DRCP maintains its untenable position that no data is more representative of the proposed discharge, and that TCEQ should just trust that DRCP's discharge will not degrade Elm and Hediondo Creeks.[9]

a. Elevated levels of aluminum and boron have been detected throughout the mine site

DRCP contends "the PFD erroneously concludes that groundwater data from one well at one location is representative of the quality of the discharge at each outfall."[10] However, the groundwater data clearly demonstrates that **twenty-three** different monitoring wells located throughout the mine detected aluminum in excess of the toxic criteria limit of 0.991 mg/L at least once.[11] Numerous wells detected aluminum concentrations many times the limit on multiple different sampling events.[12] Similarly, **fourteen** monitoring wells on the mining site detected boron in excess of the water quality standard at least once.[13] Numerous wells detected boron concentrations many times the limit on multiple sampling events.[14] Elevated levels of aluminum and boron are not isolated at one location, which indicates that the mine seepage (or groundwater) discharged at each outfall may have similar elevated levels.

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[7] PFD at 32.
[8] DRCP Exceptions at 4.
[9] At hearing, even Ms. Murphy initially testified on behalf of DRCP that the "groundwater [is in fact] more representative of the effluent than no data."[9]
[10] DRCP Exceptions at 9.
[11] Ex. DRCP 710 at 28 (Table 2).
[12] *Id.*
[13] Ex. DRCP 710 at 28 (Table 2).
[14] *Id.*

b. Groundwater is present at the Eagle Pass Mine

DRCP again argues that the record is clear that groundwater is "hardly present" at the Eagle Pass Mine.[15] DRCP attempts to essentially characterize the wastewater from its coal mining operation as though it is purely stormwater. If that were true, then DRCP would have applied for a stormwater discharge permit.[16] Tellingly, DRCP has applied for an industrial wastewater discharge permit because it knows it will discharge mine seepage and mine pit water (i.e. groundwater).[17] Indeed DRCP made groundwater an issue by conducting sampling at over twenty-three different wells and by requesting the authority to discharge groundwater.

For example, DRCP's Application states that the **flow** from outfall of RP-3 will consist of **80%** mine pit water (i.e. groundwater).[18] The total storage capacity of RP-3 is 26.6 million gallons, which translates into as much as 21.28 million gallons of mine pit water (i.e. groundwater). The volume (MGD) percentage for mine pit water in the other ponds that will ultimately discharge wastewater will be "**variable.**"[19] According to the Application, the amount of groundwater that will be discharged at each outfall is unknown, but it is certainly anticipated to have at least some mine seepage (i.e. groundwater).

The modeling cited by DRCP to support its contention that groundwater is present only in "insignificant quantities" was never submitted as part of the Application and has not been vetted by TCEQ. Even DRCP's modeling anticipates that more than two million gallons of groundwater can be present in a sedimentation pond waiting to be discharged.[20] DRCP claims to have demonstrated that even if the groundwater is extremely bad quality it will still only have a

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[15] DRCP's Exceptions at 5.
[16] Tr. at 68:15 – 18.
[17] Tr. at 68:8 – 15.
[18] Ex. DRCP 107_0037.
[19] Ex. DRCP 107_0036.
[20] Ex. DRCP 700 at 25:5.

negligible impact on the quality of discharge.[21] DRCP cites pages 12-27 of direct testimony given by Mr. Matzner.[22] However, nowhere in Mr. Matzner testimony does he opine regarding the impact that the elevated levels of aluminum and boron in the groundwater will have on the quality of the proposed discharge. Testimony of Mr. Matzner is limited to Total Dissolved Solids.[23]

Finally, for more than fifteen years groundwater samples have been collected at the Eagle Pass Mine Area.[24] During that time, dozens of wells sampled at various depths have resulted in hundreds of water quality samples. Water must have been present for each sample, underscoring the presence of groundwater at the site. DRCP nor the TCEQ has done any analysis of the impact of the groundwater on the ultimate discharge. Protecting Elm and Hediondo Creeks requires at a minimum a boron effluent limit and an aluminum monitoring requirement as recommended by the ALJs.

c. Discharge samples from Outfall No. 3 are not representative of proposed discharge

DRCP asserts that discharge samples taken on May 27, 2015 and June 8, 2015 should be relied upon as evidence that the proposed discharge does not contain elevated levels of aluminum or boron. At the time these samples were collected, Sedimentation Pond-2 did not have any mine seepage water (i.e. groundwater), which is the known source of elevated levels of aluminum and boron. Coal removal did not even begin until July 29, 2015[25]—**after these SP-2 samples were taken**. The samples referred to by DRCP are of purely stormwater. Tellingly, the later June 18, 2015 sample detected high aluminum concentrations (656 mg/L total aluminum), which triggers a monitoring requirement in the Draft Permit. This stormwater sample with

[21] DRCP Exceptions at 6.
[22] *Id.*
[23] Ex. DRCP 700 at 27:13 – 23.
[24] Ex. EDF Group 1108.
[25] Tr. at 803:17.

elevated aluminum, combined with the overwhelming groundwater data demonstrating elevated aluminum and boron, provides ample evidence that the proposed discharge warrants at least an aluminum monitoring requirement and a boron effluent limit.

III. BORON LIMIT BASED ON DATA AND SERVES TO PROTECT ELM CREEK

The ED and DRCP contend that the ALJs incorrectly required a boron effluent limit based on the decision by the RCT to include the same limit in the coal mining permit.[26] However, the recommendation by the ALJs to include a boron limit of 2.0 mg/L was based on evidence that elevated levels of boron will be present in the discharge. Specifically, the ALJs reasoned:

> It can be deduced from the RCT Permit and from the plans to construct RP-3, that DRCP anticipates at least some of the wastewater some of the time will have levels that exceed 2.0 mg/L. Several of the monitoring wells have consistently had boron concentrations over 2.0 mg/L. Given all this, **it seems protective** to require, at the bare minimum, monitoring for boron for any discharges with any mine water. What is more, **it also seems protective**, and consistent with the RCT Permit, to impose the same boron limit as the RCT Permit contains.[27]

TCEQ must also ensure the proposed discharge will not degrade Elm Creek with its contribution of boron. The TCEQ correctly points out in its Fact Sheet that "[t]he EPA Guidelines for Water Reuse Summary Tables recommend that levels of boron in water irrigation not exceed ... 2.0 mg/L for short-term."[28] Water quality in Elm Creek is of sufficient quality to be used as irrigation supply and for agricultural purposes. Mr. Wall testified he uses Elm Creek for irrigation.[29] Mr. Wall further testified that the bulk of land along Elm Creek near his

[26] ED Exceptions at 4-5; DRCP Exceptions at 13.
[27] PFD at 35 (emphasis added).
[28] Ex. ED-1, KLD-7 at 11.
[29] Ex. EDF Group 300 at 5:17 – 9.

property has historically been used for farming vegetables.[30] To ensure protection of irrigation and agricultural uses of Elm Creek, the boron effluent limit is necessary. The decision by the ALJs to include such a limit was not simply because it was included in the RCT permit—it is to protect Elm Creek.

IV. OTHER REQUIREMENT NO. 10

As explained in EDF Group's Closing Brief and Exceptions to the PFD, Elm and Hediondo Creeks can only be deemed protected from the proposed discharge if TCEQ conducts its antidegradation review **prior to issuing the permit and prior to discharging wastewater**. Conducting the review after discharge begins allows for degradation until that review is completed and the necessary permitting amendments can be made. Other Requirement No. 10 does not solve this "after-the-fact" review. Other Requirement No. 10 still allows DRCP to begin discharging wastewater and not revisit the permit until months later.[31] However, even though requiring four samples will still not insulate the receiving waters from degradation, EDF Group agrees with the ALJs that it will at least provide for a better representation of constituent concentrations in the wastewater discharge. For example, manganese was detected in the groundwater at levels significantly higher than the baseline concentration in Elm Creek.[32] Requiring four samples will better inform the TCEQ when deciding in the future whether any monitoring or effluent limits are needed.

DRCP suggests that providing four samples pursuant to Other Requirement No. 10 alleviates the need to include the recommended monitoring requirement for aluminum.[33] DRCP again overlooks the compelling data of elevated aluminum concentrations in the groundwater

[30] Ex. EDF Group 300 at 5:11 – 13..
[31] Ex. ED-1, KLD-8 at 19; Tr. at 637:21 – 638:7.
[32] Ex. EDF Group 1100 at 50:6.
[33] DRCP Exceptions at 14.

and in the June 18th discharge sampling event. The extremely high levels of aluminum present at the Eagle Pass Mine warrants a monitoring requirement throughout the duration of the mine.[34]

Finally, the ED recommends DRCP need not submit the four samples until after all of them have been collected after the final discharge event.[35] EDF Group disagrees. DRCP should be required to submit the results within 90 days of each discharge just as required by the current language in the Draft Permit. The sooner the TCEQ receives the data, the sooner any protective action can be implemented. EDF Group does not see any harm to DRCP in requiring submission of results as they are collected.

V. CONCLUSION

The EDF Group respectfully requests that the Application be remanded to the ED and that DRCP be ordered to complete its Application with the necessary data representative of its proposed discharge in order to conduct the legally-required antidegradation review. In the alternative and without waiving its arguments, to ensure the most protection as possible is afforded to Elm and Hediondo Creeks, the EDF Group respectfully request the ALJs keep its recommendations in the PFD to require an aluminum monitoring requirement, boron effluent limit and four samples at every outfall pursuant to Other Requirement No. 10, and that the Commissioners adopt the same.

[34] PFD at 34.
[35] ED Exceptions at 5 (Finding of Fact 115).

Respectfully submitted,

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CERTIFICATE OF SERVICE

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